

Editor:
Christine P. O’Hearn, Esquire

Labor & Employment News

www.brownconnery.com

LABOR & EMPLOYMENT GROUP:

WILLIAM M. TAMBUSI, ESQUIRE
wtambuss@brownconnery.com

CHRISTINE P. O’HEARN, ESQUIRE
cohearn@brownconnery.com

SUSAN M. LEMING, ESQUIRE
sleming@brownconnery.com

LOUIS R. LESSIG, ESQUIRE
llessig@brownconnery.com

DIANE S. KANE, ESQUIRE
dkane@brownconnery.com

JACQUELINE R. BARRETT, ESQUIRE
jbarrett@brownconnery.com

WILLIAM F. COOK, ESQUIRE
wcook@brownconnery.com

HENRY OH, ESQUIRE
hoh@brownconnery.com

CHRISTOPHER A. ORLANDO, ESQUIRE
corlando@brownconnery.com

MICHAEL J. MILES, ESQUIRE
mmiles@brownconnery.com

GINA M. ROSWELL, ESQUIRE
grswell@brownconnery.com

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New Jersey Division of Civil Rights Proposes New Regulations for New Jersey Family Leave Act

Christine P. O’Hearn, Esquire

On November 6, 2006, the New Jersey Division of Civil Rights (“DCR”) proposed new regulations for the New Jersey Family Leave Act (“NJFLA”), N.J.S.A. 34:11B-1 et seq. The existing regulations expire on February 6, 2007; therefore, the DCR has recommended re-adoption of the existing regulations and amendment of certain regulations. The stated purpose of the amendments is to achieve “consistency with the requirements of the Federal Family and Medical Leave Act” and “simplify compliance with both leave laws for employers that are covered by both laws.”

The proposed regulations include the following changes:

- Amending the term “care” to include time needed to arrange for changes in care of a family member such as nursing home care consistent with the FMLA (29 C.F.R. §825.116(b));
- Adoption of the definition for “continuing medical treatment” set forth in the FMLA (29 C.F.R. 825.114);
- Adoption of options for the employer to determine how to calculate a calendar year for purposes of determining eligibility such as a rolling calendar, calendar year, etc. as provided in the FMLA (29 C.F.R. §825.200(b));
- Amending the notice requirement when leave is due to the serious health condition of a family member from 15 days to 30 days consistent with the FMLA (29 U.S.C. §2612(e)(2)(B));
- Adoption of the option for the employer to transfer an employee on intermittent or reduced leave to an alternate position with equivalent pay and benefits during such leave (29 C.F.R. §825.204);

- Amendment of N.J.S.A. 13:14-1.6(b)(1) to clarify pregnant employees are entitled to both a full 12 weeks of FMLA leave for pregnancy related disability and an additional 12 weeks of NJFLA leave to care for the newly born child (thus providing a possible 24 weeks of total leave for pregnancy related leave);
- Adoption of requirements for postings advising employees of NJFLA rights as well as adoption of a written policy regarding NJFLA benefits and rights if the employer issues an employee handbook or other manual.

While the changes in the proposed regulations are certainly helpful, they will by no means render the employer’s responsibility of applying both the NJFLA and FMLA effortless because of the inherent inconsistencies between the NJFLA and FMLA which include but are not limited to differences in the hour requirement for eligibility (NJFLA requires 1,000; FMLA requires 1,250); amount of leave provided (NJFLA provides 12 weeks in 24 months; FMLA provides 12 weeks in 12 months); childcare leave (NJFLA requires leave be commenced within 1 year of birth; FMLA requires leave conclude within 1 year of birth); other employment while on leave (NJFLA permits part-time employment; FMLA is silent as to other employment) – just to name a few. Therefore, an employer’s application of NJFLA and FMLA will remain a complicated, tedious matter often requiring the assistance of counsel.

A full copy of the proposed regulations can be found at the DCR’s website at http://www.state.nj.us/lps/dcr/prorules/fla_read_option_proposal_for_pub.pdf.

The New Jersey Division of Civil Rights — An Overview

William F. Cook, Esquire

The New Jersey Law Against Discrimination (“NJLAD”) protects individuals against discrimination based on sex, race, age, sexual orientation and other protected classes with respect to employment, housing and public accommodations. The NJLAD is commonly recognized as one of the strongest anti-discrimination laws in the nation. The New Jersey Division of Civil Rights (“DCR”) is a state agency created by the NJLAD to enforce its anti-discrimination provisions. Employers may be more familiar with the federal counterpart to the DCR, the Equal Employment Opportunity Commission (“EEOC”), created under the Title VII of the Civil Rights Act of 1964 (“Title VII”). While both agencies operate under similar mandates, the agencies have differing roles and responsibilities in the resolution of employment disputes and the procedural process to assert claims under each law differs. The following is a summary of the DCR and EEOC procedures and some of the major differences between the two.

In order to assert a claim of discrimination under Title VII, an individual must first file an administrative claim with the EEOC. After such filing, the employee must wait a minimum of 180 days before filing a lawsuit. This concept is commonly referred to as “administrative exhaustion.” In contrast, the NJLAD does not have an administrative exhaustion requirement. Thus, a party is not required to first file a claim of discrimination under the NJLAD with the DCR and the involvement of the DCR is not required. For example, if an aggrieved employee seeks to sue under the NJLAD, that employee is not required to file an administrative complaint with the DCR prior to filing suit and may simply file a lawsuit in the first instance. On the other hand, if the employee seeks to assert a Title VII claim in addition to and/or instead of a NJLAD claim, the employee must first file an administrative complaint with the EEOC. The failure to meet the administrative exhaustion requirement will bar a claim.

Procedurally, claims filed with the EEOC and DCR are processed in substantially the same manner. First, the employee makes an initial report of claim. The employee is then scheduled for an interview with an investigator who completes the complaint or charge which is then verified by the employee. A charge or complaint is then formally served upon the employer. The EEOC and DCR have a work-sharing agreement which allows each agency to investigate claims under state or federal law so as to prevent duplicate work efforts by the agencies. Thus, an employee who presents a claim to the EEOC under Title VII is generally deemed to have “dually filed” the charge with both agencies and the EEOC will take the lead in handling the charge. The DCR subsequently adopts the EEOC decision. The same process applies when an employee presents a claim to the DCR. Upon the filing of a charge, the agency requests a response to the charge from the employer. The agency also seeks certain information related to the allegations in the charge. The DCR generally utilizes a form for all such cases whereas the EEOC simply requests a narrative response to the charge. After the information is submitted, the agency may send the response to the employee and

provide an opportunity to submit additional information. The investigator may determine the matter on the papers submitted or may hold a fact finding conference where all parties appear and testimony is informally taken by the investigator. The investigator may also engage in other discovery as discussed below. Finally, the agency will issue a decision finding no probable cause, in other words, no merit to the complaint, or validating the complaint. If the decision is no probable cause, the employee may nevertheless file a lawsuit under Title VII within 90 days. However, a decision of no probable cause by the DCR is generally binding and final unless appealed in some fashion.

Despite the lack of an administrative exhaustion requirement, the DCR remains a powerful state agency with a significant role in the development of New Jersey’s anti-discrimination law. First, the DCR has significant powers to enforce the NJLAD. The DCR has broad investigative powers with respect to any complaint. The DCR may issue subpoena to compel the production of business records or testimony of witnesses. The DCR may perform an on-site investigation including interviewing of employees. It is important to note that the DCR’s present policy precludes the presence of the employer’s management personnel or the employer’s counsel during any such interviews. If the DCR investigator determines the employer’s worksite fails to comply with the NJLAD and/or a NJLAD violation has occurred, the Attorney General has the power to institute an administrative enforcement action to compel the employer to remedy the violation and seek damages for the aggrieved employee.

Second, the DCR provides a resource to employees who are unable to obtain an attorney to prosecute their claim. Generally, an aggrieved employee prefers to go directly to state court rather than waiting for administrative resolution. However, employees who cannot obtain an attorney and who are pro se often find the process of filing an administrative complaint easier to navigate than filing a lawsuit pro se. Unlike the situation where an employee files a discrimination lawsuit in the Courts pro se, the DCR will assign an investigator and perform the investigation for the employee. In addition, there is no fee to file a charge with DCR whereas filing a lawsuit in state court costs \$175.00. The DCR will control the process of discovery and ultimately issue a decision as to the complaint.

Third, the DCR offers mediation, early in the administrative complaint process, to afford the parties an opportunity to explore resolution to the complaint. An employer may often receive notice of a DCR complaint much earlier than a lawsuit. The early notice of the claim by the employee may offer opportunities for reinstatement to employment, or settlement, long before the parties engage in expensive discovery and litigation. This often benefits all parties.

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Worker Freedom From Employer Intimidation Act

Jacqueline R. Barrett, Esquire

New Jersey recently enacted the “Worker Freedom from Employer Intimidation Act”, [N.J.S.A. 34:19-9](#), et seq. The Act became effective July 26, 2006. In short, the Act prohibits employers from requiring employees “to attend an employer-sponsored meeting or participate in any communications with the employer or its agents or representatives, the purpose of which is to communicate the employer’s opinion about religious or political matters.” [N.J.S.A. 34:19-10](#). It further defines “political matters” as those that “include political party affiliation and decisions to join or not join or participate in any lawful political, social, or community organization or activity.” [N.J.S.A. 34:19-9](#). This is a very broad definition and the precise contours of what will be deemed “political, social or community organization or activity” is unclear at this time. It is important to note, however, that the Act does not prohibit an employer from “permitting its employees to voluntarily attend employer-sponsored meetings or providing other communications to the employees” so long as “the employer notifies the employees that they may refuse to attend the meetings or accept the communications without penalty.” *Id.* Moreover, the Act has exceptions for religious, political and educational institutions. [N.J.S.A. 34:19-11](#).

The Act prohibits an employer from retaliating against an employee who reports a violation of the Act. [N.J.S.A. 34:19-12](#). An employee who believes his or her employer has violated the Act has 90 days to file a civil action in court. [N.J.S.A. 34:19-13](#). Further, it provides that a prevailing employee may obtain a restrain-

ing order prohibiting further violations of the Act, requiring reinstatement of the employee to his or her former position or an equivalent position and the re-prohibiting further violations of the Act, requiring reinstatement of the employee establishment of any employee benefits and seniority rights, the payment of lost wages, benefits or other remuneration and the payment of reasonable attorneys’ fees and costs. Moreover, the court may award the prevailing employee punitive damages and/or impose civil fines of \$1,000.00 for an initial violation and not more than \$5,000.00 for each subsequent violation. *Id.*

Employers must be aware of the existence of the Act and its prohibitions and ensure any meetings which may be deemed to address “political matters” are solely voluntary and that no reprisals are taken against any employee who declines to participate.

The New Jersey Division . . .

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Finally, there are some considerations that may persuade an employee to seek administrative relief in the DCR as opposed to the court system. For example, an administrative complaint is not presented to a jury and in some circumstances, this may be beneficial for the employee if for example, the jury pool in the area where a lawsuit would be brought is not receptive to employment discrimination claims. In addition, an administrative action is governed by different evidentiary rules than a state court action. For example, the hearsay rule is relaxed in an administrative action. This is critically important in an employment discrimination case, which predominantly relies upon lay testimonial evidence as opposed to demonstrative evidence or expert testimony. Another consideration is the expertise of the DCR in handling employment discrimination suits. Whereas a trial court judge handles a variety of civil litigation, the DCR specializes in employment discrimination cases and generally has a good understanding of the applica-

ble law. All of these considerations are especially significant where discovery costs may not justify court action or the employee simply can not afford an attorney.

In the end, employees and employers should understand and appreciate the DCR and the opportunity it may present to resolve an employment related claim early in the litigation process. However, an employer should also not underestimate the statutory enforcement powers of the DCR and its broad investigative and remedial powers.

A Summary of Rights Afforded to Pregnant Employees in New Jersey

Jacqueline R. Barrett, Esquire

Both the NJLAD and Title VII of the Civil Rights Act of 1964 protect pregnant employees from discrimination. In re Carnegie Center Assoc., 129 F. 3d 290, 294 (3d Cir. 1997). Generally, employers may not refuse to hire, refuse to promote, terminate or otherwise discriminate against an employee because she is pregnant or may become pregnant. This article provides a summary of some of the substantial rights and leave benefits afforded to pregnant employees.

First, an employer must accommodate a pregnant employee who is unable to perform her job or must take a leave of absence because of a pregnancy related disability. Both Title VII and NJLAD require employers to treat pregnant employees the same as it treats other temporarily disabled employees. Carnegie, 129 F. 3d at 294-297. However, the employer need not provide special accommodations to pregnant employees over and above accommodations which are provided to other temporarily disabled employees who are not pregnant. Id. Thus, if a pregnant employee is temporarily unable to perform her job or certain functions due to pregnancy, the employer must generally provide the employee with light duty assignments or a job transfer provided it is not unreasonably burdensome to do so and/or if it makes such accommodations for other employees.

Second, a pregnant employee is entitled to certain leave related to pregnancy. In New Jersey, an employee is entitled to disability benefits under the New Jersey Temporary Disability Benefits Law ("NJTDBL"), N.J.S.A. §§ 43:21-25 to 42, if they are unable to work due to a pregnancy related disability. Under the NJTDBL, pregnant employees are entitled to the same benefits as those employees with any other disability. D'Alia v. Allied-Signal Corp., 260 N.J. Super. 1, 7-8 (1992). Generally, an employee may collect benefits for up to 4 weeks prior to her anticipated delivery date and up to 6 weeks after her actual delivery date in the case of a normal pregnancy, as that is generally the time period under which a pregnant woman is deemed unable to work. In the case of a complicated delivery, additional weeks post-birth may be deemed appropriate.

Third, pregnant women employed by an employer with more than 50 employees are entitled to leave under the federal Family and Medical Leave Act ("FMLA") and the New Jersey Family Leave Act ("NJFLA"), which both require employers to provide eligible employees with up to 12 weeks of unpaid leave for the birth of a new child and/or care of a newborn. 29 U.S.C. §2612(a)(1); N.J.S.A. § 34:11B-4.¹ While the FMLA allows the employee time off from work for her own disability (including pregnancy related disability), the NJFLA allows the employee time off from work to care for a newborn child. In New Jersey, when an employee takes leave for a purpose covered by both the FMLA and the NJFLA the leave simultaneously applies under both laws. N.J.A.C. § 13:14-1.6(a). However, if an employee takes FMLA leave for a

purpose not covered by the NJFLA, such as to care for her own disability related to the pregnancy or childbirth, an eligible employee may thereafter take leave under the NJFLA for an additional 12 weeks to care for the newly born child. N.J.A.C. § 13:14-1.6(b). Thus, a pregnant employee may take as much as 24 weeks leave – up to 12 weeks FMLA leave for a pregnancy related disability and an additional 12 weeks leave to care for a newly born child for any given pregnancy. Newly proposed regulations make clear the 12 weeks NJFLA leave to care for a newborn child is in addition to any leave under the FMLA and/or NJTDBL. Mandatory maternity leave is, however, prohibited. Castellano v. Linden Bd. of Ed., 79 N.J. 407, 412 (1979). Thus, an employer may not require a pregnant employee to take leave.

In addition to providing leave under the FMLA and/or NJFLA, an employer must maintain an employee's existing level of coverage under a group health plan while the employee is on leave and continue making the same contribution to the health care premiums as prior to the employee's leave. 29 U.S.C. § 2614(c)(1); N.J.S.A. § 34:11B-8. When the employee returns from leave, the employer must place her in the same or equivalent position. 29 U.S.C. § 2614(a)(1); N.J.S.A. § 34:11B-8(a). Moreover, an employer must hold the employee's position for the same length of time that it holds jobs for other disabled employees unless the employee informs the employer that she does not intend to return to work. 29 C.F.R. § 1604.10.

While employers with less than 50 employees are not legally required to provide leave under the FMLA or NJFLA, employers must nevertheless apply the same leave policies to pregnant employees as it does to other employees who request leave for non-pregnancy disabilities. See 42 U.S.C. § 2000e-2(a).

In summary, pregnant employees are protected under various federal and state statutes and are entitled to certain accommodations, job protected leave for pregnancy related disability and job protected leave to care for a new born child. Employers should periodically review their policies and procedures to ensure they are in compliance with all such laws and regulations.

¹ In order to be eligible, the employee must have worked at least 1250 hours for FMLA leave and 1000 non-overtime hours for NJ FLA leave in the prior 12 months. See 29 U.S.C. § 2611(2)(A); N.J.S.A. § 34:11B-3(e).

FMLA Changes on the Horizon

Louis R. Lessig, Esquire

On December 1, 2006, the U.S. Department of Labor (DOL) engaged in its first attempt at the long awaited revisions to the regulations that apply to the Family Medical Leave Act (FMLA) by issuing a Request for Information. The Request For Information is a first step on the road to publishing new regulations that will hopefully make it easier for employers to deal with problematic areas of the FMLA that have arisen since the law went into effect in August of 1993.

Presently, the DOL is seeking comment on the proposed revisions by February 2, 2007. While they are accepting comments that concern any aspect of the FMLA, there are some questions that are of particular interest such as defining in more specific terms a "serious health condition." This definition has been challenging for employers, especially with ailments such as the common cold.

Another area of interest is the interplay between the FMLA and other federal laws, such as the Health Insurance Portability and Accountability Act (HIPAA). Since the passage of HIPAA there have been several challenges facing employers because while they do not need authorization to obtain the medical information from the employee, the health care provider may require authorization to release the information. Employees are not often cooperative in this process and/or this causes delays in processing FMLA requests. Similarly, the lack of specific information provided and the ability to understand the documentation sent from the health care provider are also concerns.

One other problematic issue for employers is intermittent leave under the FMLA. While an employee may be entitled to intermittent leave under the FMLA, it can be a logistical nightmare riddled with potential missteps for the employer. The problem is further compounded by the fact that employees are currently able to take leave in as small an amount of time as the payroll system can calculate. As a result, lateness and discipline become issues that can effect morale as well as productivity and profitability. Furthermore, intermittent leave is difficult to monitor and easily abused.

In addition to the specific questions posed by the DOL, pertinent information was also disclosed, including the determination that 40% of employees who are entitled to FMLA leave are not aware of their rights. Despite posting and notice requirements, employees are either not informed or the notices may be in a language the employee does not understand. Considering the potential exposure that currently exists for employers under the FMLA, this is one area every employer should immediately address to ensure its workforce is aware and receives proper notification when FMLA time is designated.

While the new proposed regulations are unlikely to be released until late 2007 at the earliest, the issues raised certainly suggest major revisions are likely.

B&C BROWN & CONNERY, LLP

360 Haddon Avenue
P.O. Box 539
Westmont, NJ 08108
Phone: (856) 854-8900
Fax: (856) 858-4967

129 North Broadway
Suite 302
Camden, NJ 08102
Phone: (856) 365-5100
Fax: (856) 858-4967

6 North Broad Street
Woodbury, NJ 08096
Phone: (856) 812-8900
Fax: (856) 853-9933

1500 Market Street
12th Floor, East Tower
Centre Square
Philadelphia, PA 19102
Phone: (215) 592-4352
Fax: (856) 858-4967

Our Web Address:

www.brownconnery.com

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Around the Firm

Henry Oh, Esq. was recently appointed to serve as an arbitrator for fee disputes for Burlington County Fee Arbitration Committee by the New Jersey Supreme Court Office of Attorney Ethics.

William F. Cook, Esq. will teach "New Jersey Practice and Procedure" as an adjunct professor at Rutgers-Camden Law School for the Spring 2007 semester.

Louis R. Lessig, Esq. will speak at the Tri-State Conference entitled, *HR, Legislation and Litigation Perfect Together* in March 2007. Mr. Lessig will also speak in June 2007 on *FMLA Jeopardy* in Las Vegas, NV.

Christine P. O'Hearn, Esq. authored an article entitled, *Accommodation Versus Risk-Friction Between Accommodating a Disabled Employee and Ensuring Patient Safety* in the New Jersey Law Journal in October 2006 (186 N.J.L.J. 286).

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